Supreme Court, U.S.
FILED
SEP 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1978

No. 78-225

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
*Defendant Appellants,*
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
*Intervenor Appellants,*

versus

UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
*Appellees.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA**

# MOTION TO AFFIRM

JEROME COHEN
JAMES RUTKOWSKI

P.O. Box 1049
Salinas, California 93902

MICHAEL W. L. MCCRORY

631 Wood Street
Vineland, New Jersey 08360

Attorneys for Plaintiff
Appellees

## TABLE OF CONTENTS


*Page*

TABLE OF AUTHORITIES ..... iii

MOTION TO AFFIRM ..... 1

OPINION BELOW ..... 2

QUESTIONS PRESENTED ..... 2

STATEMENT OF THE CASE ..... 4

ARGUMENT ..... 7

Introduction ..... 7

1. Exclusion Of A Substantial Number Of Farm Workers From An Exclusive Recognition Procedure Clearly Violates First and Fourteenth Amendment Rights ..... 10

A. The AERA Establishes A Unique Exclusive Reliance Upon State-Conducted Elections... 11

B. The Excessive Length Of The Election Procedures Prevents Farm Workers From Exercising First Amendment Rights ..... 14

C. The Court Was Obviously Correct In Holding That The Statutory Restrictions On Eligible Employees Infringes Upon The First Amendment Rights Of Arizona Farm Workers..... 15

D. The Court Was Clearly Correct In Holding That The Lack Of Alternatives Or Remedies Where An Election Is Impossible Infringes Upon First Amendment Rights ..... 17

E. The District Court's Decision Is Supportable On Other Grounds And Raises No Substantial Questions For Plenary Review ..... 18

2. The District Court Was Clearly Correct In Finding § 23-1385(B)(8) Invalid And Appellants Raise No Substantial Federal Question ..... 19
3. The Blatant Unconstitutionality Of The Section Imposing Criminal Penalties Raises No Issues For Further Review ..... 22
4. The Act's Blanket Denial Of Access To An Employer's Facilities Is Constitutionally Overbroad . 24
5. Invalidation Of The Section Forcing Unions To Submit To Compulsory Arbitration Without Court Review Was Clearly Correct ..... 26
6. The District Court's Conclusion That The Unconstitutional Provisions Were Inseparable From The Rest Of The Act Is Correct And In Accord With Supreme Court Precedents ..... 29
7. The Three-Judge Court Ruled Properly That The Record Of Enforcement Of The AERA Against Appellees Established An Article III Controversy 32
A. The Record Of Enforcement Of The AERA, Both Actual and Threatened, Reveals A Real And Justiciable Controversy..... 32
B. Plaintiffs Have Further Demonstrated A Case Or Controversy Under The Standard Applied When Statutes Are Challenged for Facial Overbreadth..... 36
8. The Three-Judge Panel Ruled Correctly That The Doctrine Of Abstention Is Inappropriate In The Instant Case ..... 39
CONCLUSION ..... 44



## TABLE OF AUTHORITIES

*Cases* — *Page*
*AFL v. Swing*, 312 U.S. 321 (1941) ..... 9, 41
*Agricultural Labor Relations Board v. Superior Court*, 16 Cal.3d 392, app. dismissed, 429 U.S. 802 (1976) ..... 25
*Alabama State Federation of Labor v. McAdory*, 325 U.S. 450 (1945) ..... 37, 38
*Allied Chemical & Alkali Workers v. PPG Co.*, 404 U.S. 157 (1971) ..... 16
*Arnett v. Kennedy*, 416 U.S. 134 (1974) ..... 24
*Ashton v. Kentucky*, 384 U.S. 195 (1966)..... 23
*Baggett v. Bullitt*, 377 U.S. 360 (1964) .....36, 39, 40, 43
*Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1959)..... 41
*Bates v. Little Rock*, 361 U.S. 516 (1960)..... 14
*Bigelow v. Virginia*, 421 U.S. 809 (1975) ..... 37
*Broadrick v. Oklahoma*, 413 U.S. 601 (1973)..... 37
*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 32
*Carey v. Population Services Int'l.*, 431 U.S. 678 (1977)..... 34, 38
*Carlson v. California*, 310 U.S. 106 (1939)..... 26
*Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).....9, 26, 33, 41
*Carter v. Carter Coal Co.*, 398 U.S. 238 (1936) . 29, 30, 31
*Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972)..... 24
*Champlin Refining Co. v. Corporations Commission*, 286 U.S. 210 (1932) ..... 32
*Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923)..... 27

*Cases* (Continued) — *Page*

*City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) ..... 18
*Craig v. Boren*, 431 U.S. 678 (1977) ..... 38
*Cusper v. Pontikes*, 414 U.S. 51 (1973) ..... 18
*Dayton Typographical Union Nos. 57 v. NLRB*, 326 F.2d 634 (D.C. Cir. 1963) ..... 12
*Diedrich v. American News Co.*, 128 F.2d 144 (10th Cir. 1942) ..... 28
*Doe v. Bolton*, 410 U.S. 179 (1973) ..... 24, 34, 35
*Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) ... 37
*Dorchy v. Kansas*, 264 U.S. 286 (1924) ..... 27, 29, 30
*Dunn v. Blumstein*, 415 U.S. 330 (1972) ..... 18
*Eisenstadt v. Baird*, 405 U.S. 438 (1972) ..... 10
*Epperson v. Arkansas*, 393 U.S. 97 (1968) ..... 36
*Gooding v. Wilson*, 405 U.S. 518 (1972) ..... 36
*Hadnott v. Amos*, 394 U.S. 58 (1969) ..... 19
*Hague v. CIO*, 307 U.S. 496 (1939) ..... 15
*Harman v. Forssenius*, 380 U.S. 528 (1965) ..... 40, 43
*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) ..... 19
*Healy v. James*, 408 U.S. 169 (1972) ..... 14
*Henderson v. Ugalde*, 147 P.2d 490 (1944) ..... 27
*Illinois Migrant Council v. Campbell Soup Co.*, 478 F.2d 73 (5th Cir. 1973) ..... 25
*J.P. Stevens & Co., Inc., Gilistan Div. v. NLRB*, 441 F.2d 514 (5th Cir. 1971) ..... 17
*Keyishian v. Board of Regents*, 355 U.S. 589 (1967) ..... 36, 43
*Kroder-Reubel Co.*, 72 NLRB 240 (1947) ..... 15
*Kramer v. Union School District*, 395 U.S. 621 (1969) ..... 19





*Cases* (Continued) — *Page*

*Linden Lumber Div. v. NLRB*, 419 U.S. 301 (1974) ..... 17
*Lynch v. U.S.*, 292 U.S. 573 (1934) ..... 29
*McNeese v. Board of Education*, 373 U.S. 668 (1963) ..... 39
*Marsh v. Alabama*, 326 U.S. 501 (1946) ..... 24, 25
*Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270 (1941) ..... 35
*Meek v. Pittinger*, 421 U.S. 349 (1975) ..... 29, 30
*Mengel Co. v. Nashville Paper Prod. & Spec. Workers Union*, 221 F.2d 644 (6th Cir. 1955) .. 27, 28
*NAACP v. Alabama, ex rel Patterson*, 357 U.S. 449 (1958) ..... 14, 38
*NAACP v. Button*, 371 U.S. 415 (1963) ..... 14, 23, 36
*Nebbia v. New York*, 291 U.S. 502 (1934) ..... 27
*New York Times v. Sullivan*, 376 U.S. 254 (1964) . 20, 42
*NLRB v. Babcock & Wilcox*, 351 U.S. 105 (1956) 9, 24, 25
*NLRB v. Fruit & Vegetable Packers (Treefruits)*, 377 U.S. 58 (1964) ..... 9, 21
*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) 17
*NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) ..... 15
*NLRB v. Servette*, 377 U.S. 46 (1964) ..... 9
*Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) ..... 20
*Re Smith*, 381 Pa. 223, 122 A.2d 625, *app. dismissed*, 350 U.S. 858 (1955) ..... 28
*Shelton v. Tucker*, 364 U.S. 479 (1960) ..... 36
*Steffel v. Thompson*, 415 U.S. 452 (1974) ..... 34, 35, 40
*Thomas v. Collins*, 232 U.S. 516 (1974) ..... 15, 26
*Thornhill v. Alabama*, 310 U.S. 88 (1940) ..... 9, 26, 36

*Cases* (Continued) *Page*

*Tinker v. Des Moines School District*, 393 U.S. 503 (1969) ..... 16

*United Mine Workers v. Illinois Bar Association*, 389 U.S. 217 (1967) ..... 38

*United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) ..... 10

*United States v. Jackson*, 390 U.S. 570 (1968) .... 32

*United States v. Sullivan*, 332 U.S. 689 (1948) .... 23

*Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y. 1975), *aff'd* 423 U.S. 1041 (1976) ..... 20, 21, 42

*Williams v. Rhodes*, 393 U.S. 23 (1968) ..... 14, 18

*Wisconsin v. Constantineau*, 400 U.S. 433 (1971) . 40

*Zwickler v. Koota*, 389 U.S. 241 (1967) ..... 36, 39, 40, 42





United States Constitution

Article III ..... 3, 32, 34, 39, 44

First Amendment ..... passim

Seventh Amendment ..... 28, 29

Fourteenth Amendment ..... passim

United States Code

29 U.S.C. § 158(b)(7)(c) ..... 12

29 U.S.C. § 159(a) ..... 11

42 U.S.C. § 1983 ..... 39

National Labor Relations Act

§ 8(b)(4)(ii)(b) ..... 21

Arizona Revised Statutes

§ 12-1501 ..... 28

§ 23-1381 ..... 2, 4, 30

§ 23-1382 ..... 9, 10, 15

§ 23-1383 ..... 31

§ 23-1384 ..... 9, 23

§ 23-1385 . 8, 9, 11, 12, 17, 19, 20, 21, 22, 23, 25, 33, 40, 41, 43

§ 23-1389 ..... 10, 11, 12, 14, 19, 30, 31

§ 23-1390 ..... 20

§ 23-1392 ..... 9, 22, 34

§ 23-1393 ..... 8, 20, 22, 26, 27, 28, 29, 41

Arizona Rules of Court

Rule 65, Arizona Rules of Civil Procedure ..... 26

California Agricultural Labor Relations Act

California Labor Code § 1140 *et.seq.* ..... 8

Arizona Administrative Procedures Act ..... 42

Law Reviews

***State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretative Analysis***, Warren H. Cohen and

Jonathan Rose, Arizona State University Law Journal, Vol. 1973, pp. 315, *et.seq.* ..... 7

*State Regulation of Agricultural Labor Relations—Arizona Farm Labor Law—A Constitutional Analysis*, Jonathan Rose, Arizona State University Law Journal, Vol. 1973, pp. 373, *et.seq.* ..... 7



IN THE
**Supreme Court of the United States**
OCTOBER TERM, 1978

---

No. 78-225

---

BRUCE BABBITT, GOVERNOR OF THE STATE OF ARIZONA, ET AL.,
*Defendant Appellants,*
AND
ARIZONA FARM BUREAU FEDERATION,
AN ARIZONA CORPORATION, ET AL.,
*Intervenor Appellants,*
versus
UNITED FARM WORKERS NATIONAL UNION
ON BEHALF OF ITSELF AND ITS MEMBERS, ET AL.,
*Appellees.*

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA**

---

## MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court, appellees[1] move that the final judgment and decree of the three-judge district court be affirmed on the grounds that

---

[1] Appellees are United Farm Workers National Union (presently United Farm Workers of America) (UFW), on behalf of itself and its members, Gustavo Gutierrez an agent of the UFW, Ruben Alaniz and Matilda Varela, on behalf of themselves and all other Arizona farm workers, and Wendy Rose, a supporter of the UFW. Appellees' motion for class certification was not decided by the court below.

the questions raised in the appellants' Jurisdictional Statement are insubstantial and that the decision below is so plainly correct as not to warrant further review by this Court.

## OPINION BELOW

The opinion and judgment of the district court found A.R.S. §§ 23-1381 *et.seq.* unconstitutional and enjoined their enforcement. That opinion is reported at 449 F.Supp. 449 and is reprinted in the Appendix of appellants' Jurisdictional Statement.

## QUESTIONS PRESENTED

1. Does an election procedure, created by the state and made the exclusive means to union recognition, which by definition and actual operation disenfranchises a substantial number if not a majority of the persons it purports to enfranchise, violate the First and Fourteenth Amendment rights of those persons so deprived of their right to vote and associate?

2. Does a statute which calls for prior restraints upon the communication of "dishonest, untruthful and deceptive publicity," plus the imposition of criminal penalties upon a labor organization and its members who undertake such communications, prevent the uninhibited, robust and wide-open public debate protected by the First Amendment particularly in the area of labor relations, when that statute contains no narrowing provisions requiring a showing of actual malice on the part of the speakers?

3. Whether a provision of a lengthy and frequently overbroad regulatory statute which transforms any violation of



that statute into a crime, thereby making hundreds of unfair labor practices also punishable as crimes, prohibits conduct protected by the First Amendment and fails to punish only by means of clear provisions that instruct the ordinary person how to avoid unlawful conduct?

4. Does a statute which permits an employer to deny access under all circumstances to union representatives who wish to communicate with workers located in his fields or labor camps provide for that constitutionally required accommodation between speech rights and property rights required by this Court in the labor context?

5. Whether a labor relations statute which gives to the employer the unilateral right to compel a labor organization with which he has a dispute to submit that dispute to compulsory binding arbitration violates the Due Process Clause of the Fourteen Amendment?

6. Should inter-dependent parts of a labor relations statute which claims to attempt a delicate balance between competing interests of employers and employees continue to operate when other portions of that statute which chiefly established that "balance" have been held unconstitutional?

7. Have a labor organization and its members who have had a criminal regulatory statute extensively enforced against them and who have been severely and irreparably injured by that enforcement asserted a sufficiently direct threat of personal detriment and adequately demonstrated that they are parties against whom that statute directly operates so as to satisfy the Article III case or controversy requirement—particularly when their challenge to that statute largely alleges facial overbreadth restricting First Amendment freedoms?

8. In a civil rights action alleging facial invalidity of several provisions for violating First and Fourteenth Amend-

ment rights should a federal court abstain when (1) the meaning and operation of those provisions are certain on their face, (2) they do not—without an actual rewriting of the statute—lend themselves to interpretations by state courts which would avoid the constitutional issues and (3) there is little likelihood of an expeditious state court proceeding that would resolve the constitutional questions raised?

## STATEMENT OF THE CASE

In May of 1972 the Arizona legislature passed the Arizona Agricultural Employment Relations Act, A.R.S. § 23-1381 *et.seq.*, (hereafter AERA or Act). Fundamentally, the AERA placed sweeping restrictions upon the use, by farm workers and labor organizations representing them, of traditional activities like picketing, strikes and boycotts. In return the Act established a secret ballot election process which served as the exclusive means to obtain union recognition and representation.

Immediately after the Act took effect in August 1972, the Agricultural Employment Relations Board (hereafter Board) was appointed, a staff was hired and enforcement of the AERA was initiated by both the state and private employers. Within the first year of operation at least one agricultural employer relied upon the AERA in his successful efforts to obtain an injunction against strike activity by the appellee union. A retail grocery chain also invoked several provisions of the Act in its civil suit to enjoin the handbilling and oral conversation conducted at its various stores by the appellee UFW and its members in furtherance of its boycott activities.

In August of 1973 the plaintiff-appellees filed their



Amended Complaint in this action alleging that eleven major provisions of the Act on their face violated the First and Fourteenth Amendments. They claimed that at least three other provisions were unconstitutional when applied in the context of seasonal and migrant farm workers. Finally it was asserted that the entire Act violated the Equal Protection Clause, since the Act made arbitrary distinctions between classes of agricultural employees lacking any rational basis.

By the time the case went to trial in January 1977 the record revealed at least 20 different occasions when the AERA had been applied in either civil actions or administrative Board proceedings, including numerous proceedings directed against the appellee UFW and its members.

The three-judge panel conducted a four day trial which included testimony from witnesses provided by both sides extremely knowledgeable in the field of agriculture and labor relations. The judges found several of these persons qualified as experts in these fields and credited their testimony as such. In addition the court was presented with two comprehensive stipulations relevant to major issues in the case. One was a detailed stipulation relating to enforcement of the Act; the second was an extensive stipulation regarding the seasonal nature of agriculture in Arizona, including detailed information about the growing season for numerous crops, the number of persons employed in each, and information related to the manner of recruiting and utilizing those persons.[2]

---

[2] Both stipulations are part of the record. The first is referred to herein as *Stipulation Regarding Enforcement:* its full caption reads *Stipulated Statement of Status of Past and Pending Actions Taken in Accordance With The Agricultural Employment Relations Act.* The second is captioned *Stipulation Regarding Harvest and Pre-Harvest Seasons;* herein it is cited as *Stipulation on Seasonality.*

Testimony was presented regarding the unique circumstances extant in agricultural labor—particularly those emanating from its seasonal and migrant nature—and the peculiar problems that result therefrom when agricultural employees attempt to organize. The court also heard and credited testimony from expert witnesses relevant to the operation of the AERA, particularly the election provisions, in the context of this unique industry.

The record also contained uncontradicted testimony as to the extensive adverse effects that five years' of enforcement of the AERA had had upon both Arizona farm workers and upon the appellee union.

After extensive post-trial briefing the judges held that four provisions of the Act on their face violated the First and Fourteenth Amendments. They also found that the election procedures operated to disenfranchise a substantial number if not a majority of farm workers and denied them the freedom to organize a union guaranteed by the First Amendment.

The court further found that since those five provisions were obviously critical to the intended and meaningful operation of the statute, without them the remainder of the Act was inoperable. Thus, they held that these provisions were inseparable and the entire Act would fall.



## ARGUMENT

### *Introduction*

The Arizona Agricultural Employment relations Act was born amidst statewide controversy and heated political debate. The brainchild of the intervening Arizona Farm Bureau Federation and grower associations who drafted it and invested heavily in securing its passage,[3] the AERA received widespread criticism from its inception for its blatantly one-sided approach to the delicate area of agricultural farm labor relations.

Clergy, labor leaders and civil rights advocates denounced its heavy-handed deprivations of farm workers' rights of speech and association. Legal scholars amply demonstrated how the AERA, supposedly "patterned after" the National Labor Relations Act, in fact contained numerous modifications of the NLRA, all of which tipped the delicate balance accomplished in the NLRA in favor of Arizona's agricultural employers while seriously infringing upon fundamental rights of farm workers in the process.[4]

So outraged was a large segment of the Arizona public at the adoption of the Act that a recall campaign was launched against Arizona's governor for his part in its passage. In the ten months following the passage of the Act, far more

---

[3] See p. 13, Motion to Intervene, October 1, 1973.

[4] See *State Regulation of Agricultural Labor Relations—The Arizona Farm Labor Law—An Interpretative and Comparative Analysis*, Warren H. Cohen and Jonathan Rose, Arizona State University Law Journal Vol. 1973, pp. 315 *et.seq.*; *State Regulation of Agricultural Labor Relations—Arizona Farm Labor Law—A Constitutional Analysis*, Jonathan Rose, Arizona State University Law Journal, Vol. 1973, pp. 373 *et.seq.*

than that number of signatures necessary for placing the recall on the ballot were collected.

However, perhaps the most revealing indicator of the absence of any real protection for farm workers in the Act was the Act's complete failure to inspire worker confidence in its use. The record shows that workers and labor organizations petitioned for only seven elections in five years under the AERA, while in California, on the other hand, farm workers and labor groups representing them, including the appellee UFW, petitioned for almost 400 elections in the first five months of the operation of the California Agricultural Relations Act.[5]

After over a year of enforcement of the AERA, the appellees, who had been the target of almost all that enforcement, filed their Amended Complaint in this action. In that Complaint they pointed to some 11 provisions of the Act which because of their facial overbreadth deprived farm workers and labor organizations representing them of the rights of speech and association guaranteed by the First and Fourteenth Amendments. Examples of sections which were challenged as reflecting a total disregard for First Amendment freedoms included:

1. The Act's sweeping restrictions on boycott activity, both primary and secondary, reaching so far as to prohibit oral conversations with consumers and retailers [§§ 23-1385(B)(6),(7) and (8)];

2. Provisions of the AERA which enabled agricultural employers to obtain total bans against strikes and picketing, including temporary restraining orders without notice [§ 23-1385(B)(12) and § 23-1393(B)];

[5] Cal. Labor Code § 1140 *et. seq.*



3. Restrictions, enforced by criminal penalties, upon the topics a labor organization was permitted to raise in collective bargaining [§§ 23-1384, 23-1385(B)(11)];

4. The total denial of access of union representatives to an employer's premises [§ 23-1385(C)];

5. The Act's limiting of the right to strike to only a majority of an agricultural employer's employees [§§ 23-1385(B)(13)];

6. The AERA's attempt to limit the scope of the labor dispute, and the rights concomitant to such a dispute, to an employer and his immediate employees [§ 23-1382(6)];

7. The application of criminal penalties for any violations of the Act, thus transforming the lengthy regulatory statute into an overbroad and vague criminal statute [§ 23-1392].

Most of the above-cited provisions of the law conflicted directly with earlier decisions of this Court, including *A.F.L. v. Swing*, 312 U.S. 321 (1941); *N.L.R.B. v. Babcock and Wilcox*, 351 U.S. 105 (1956); *N.L.R.B. v. Fruit and Vegetable Packers*, 377 U.S. 58 (1964); *N.L.R.B. v. Servette*, 377 U.S. 46 (1964); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).

All of these sections were designed to deny farm workers the use of those communicative tools recognized as essential to workers in labor disputes, *Thornhill, supra*, and all effectively deprived appellees of constitutional rights of speech and association.

In addition to those sections which suffered from facial overbreadth, the AERA purported to provide an election procedure by which seasonal farm workers could select collective bargaining representatives. However, this procedure

was designed, and in fact operated, to disenfranchise most of the workers that the law's backers claimed it would serve. [§ 23-1389][6]

Finally, the AERA made distinctions between agricultural employees to be severely regulated and those not to be regulated—distinctions which bore no rational relationships to the purported objective of the Act [§ 23-1382(1)]. Plaintiff-appellees alleged such arbitrary and unreasonable distinctions among farm workers constituted a violation of the Equal Protection Clause of the Fourteenth Amendment. *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972).

In view of the blatant constitutional defects which abound throughout the inter-related parts of the Act, there can be no question but that the three-judge panel below decided correctly in finding the entire Act unconstitutional. Nor is it surprising that the district court invalidated the entire Act after a specific discussion of only five of the many sections of the law challenged. As shown below, those sections were critical to the operation of this legislative scheme and were among those provisions most violative of constitutional rights.

By focusing on these five central issues the district court demonstrated a sound basis for invalidating the entire Act while avoiding the need to rule upon the longer list of constitutional questions raised in the Amended Complaint. For the same reason it is unnecessary for appellees at this time to discuss in detail challenged provisions other than those five specifically addressed by the three-judge panel.

1. *Exclusion Of A Substantial Number Of Farm Workers From An Exclusive Recognition Procedure Clearly Violates First and Fourteenth Amendment Rights.*

[6] See § 1 below and App. A at 14-30, Jurisdictional Statement.



Under the provisions of the AERA, the Arizona legislature established an exclusive state-regulated procedure for determining union recognition and representation for farm workers. The evidence produced at the trial demonstrated that these procedures, by both definition and operation, excluded a substantial number of farm workers from seeking and obtaining union recognition and representation, thus preventing them from exercising their rights to organize guaranteed by the First and Fourteenth Amendments to the United States Constitution.

As held by the court below, it was the creation of this initial barrier to the exercise of the right to organize and freedom of speech and assembly, which was the fatal flaw in the Arizona Act and which compelled the invalidation of § 23-1389 and the entire statute.

A. *The AERA establishes a unique exclusive reliance upon state-conducted elections.*

Unlike the NLRA, the Arizona Act funnels all union recognition and representation demands through a state operated election procedure. The AERA limits recognition to "representatives *selected by a secret ballot* . . ." § 23-1389 (A),[7] and expressly restricts the employer's duty to bargain collectively to "a representative of his agricultural employees [who] has been determined by means of a valid *secret ballot election.*" § 23-1385(A)(5).

Thus the AERA eliminates alternative means of obtaining recognition, e.g., through authorization cards, and

[7] *cf.* 29 U.S.C. § 159(a) which determines recognition based upon "representatives *designated* or selected by secret ballot."

provides agricultural employers with a means to compel workers to seek such representation solely through the statutory election procedures. In addition all recognitional picketing and boycott activity is prohibited as soon as a petition for election is filed and remains prohibited, regardless of the length of time, until an election is held. § 23-1385(B)(12)(c).[8] Agricultural employers themselves are free to invoke this procedure through the unrestricted right to file a petition for an election when faced with any recognitional activity. § 23-1389(C)(2).[9]

It is this unprecedented prohibition upon recognition activity which establishes the winning of a secret ballot election under the AERA as the bottleneck through which all union organizing must pass. As held by the court below, the election section, § 23-1389, "is the threshold over which employees must pass if they desire to exercise their constitutional right to ' . . . organize . . . , take concerted action . . . through representatives of their own choosing' " (App. A at 25, Jurisdictional Statement).

In examining this threshold created by the AERA the three-judge panel found that the evidence presented established that in fact a substantial and significant number of farm workers were prevented from exercising their fundamental First Amendment freedoms.[10]

[8] *cf.* 29 U.S.C. § 158(b)(7)(c) and *Dayton Typographical Union No. 57 v. NLRB*, 326 F.2d 634 (D.C. Cir. 1963).

[9] This provision has been invoked in two of the nine petitions filed under the AERA. The employer's petition was withdrawn in each case once the picketing stopped.

[10] Appellants' contention that the district court's holding raises constitutional doubts concerning the election procedures of the NLRA is clearly unfounded. The finding by the panel that NLRA-like election procedures are unsuitable for a unique group like agricultural employees does not undermine those procedures themselves. The NLRA, of course, specifically excludes agricultural workers from its coverage, 29 U.S.C. § 152(3).



Based upon the testimony presented, the court determined that to seek an election there must be a three to six week initial organizing period and that once a petition was filed, the administrative procedures prior to holding the election required an additional six to seven weeks for completion. When placed in the context of a four to six week seasonal harvest for major Arizona crops—with only a two to four week period of "peak" employment—the court reached the obvious conclusion that: "the entire [election] process cannot take place before a majority of the employees finish their work and leave their place of employment." (Finding of Fact, App. at A 18, Jurisdictional Statement.)

The evidence further established not only the ineffectiveness but also the actual inoperability of these procedures. In the five and one-half years the AERA was in effect only nine petitions were filed for elections. Of these only three resulted in elections—all in situations where the employer consented. The dismal record of the AERA is highlighted when compared to the experience in neighboring California where the record showed that more than 400 elections were held in the first five months of the operation of the California Agricultural Relations Act, i.e., September 1975 to

In addition, while it is true that the lengthy administrative procedures of the two Acts, from the filing of a petition to the holding of an election are "virtually identical," the provisions governing recognitional picketing and recognition based upon authorization cards are almost diametrically opposed—the AERA prohibiting the use of both. Likewise the NLRA contains no legislatively mandated exclusions from the election process such as the AERA's exclusion of workers under the age of 16 or those who have not worked two consecutive years. These and numerous other differences between the two statutes preclude such a superficial application of the district court's ruling to the NLRA.

February 1976, upon petitions by the appellee UFW or the Teamsters Union, each vying to represent farm workers.

The comparable inoperability of the election procedures in the Arizona Act was reflected in the record. The four remaining petitions of the total seven were filed by the Teamsters Union at lettuce ranches in the 1974 fall season and were contested by the employers. Three of these petitions were subsequently withdrawn at the end of the season prior to the scheduling or holding of any elections. The fourth petition resulted in the scheduling of an election for a date which was one week after the end of the harvest season and at a time when the majority of employees had left the ranch. That petition was also withdrawn at the end of the season. (See *Stipulation Regarding Enforcement*, paragraphs 4, 5, and *Stipulation on Seasonality*, Cactus Ranch Data, 1974).

B. *The excessive length of the election procedures prevents farm workers from exercising First Amendment rights.*

These two central findings of fact by the three-judge panel—(1) that the election procedures are the single threshold over which Arizona farm workers must pass to exercise their rights to organize a union and (2) that the time necessary to accomplish this is longer than the employment period of most Arizona farm workers—inescapably compel the conclusion reached by the district court invalidating the recognition provisions of § 23-1389. This conclusion is neither novel nor unprecedented and is so obviously required by the evidence and established legal principles that further review by this court is unnecessary. *Healy v. James*, 408 U.S. 169 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama, ex rel*



*Patterson*, 357 U.S. 449 (1958); *Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).[11]

C. *The court was obviously correct in holding that the statutory restrictions on eligible employees infringes upon the First Amendment rights of Arizona farm workers.*

The Arizona Act, again unlike the NLRA, legislatively excludes certain farm workers from the election process through the definitions of eligible employees, in particular those under 16 years of age and those not employed by the same grower during the "preceding calendar year."[12] The

[11] The growers and state never directly dispute the analysis or legal conclusions of the three-judge panel on these central issues which the court found to be the fatal defects in the Act. Rather the thrust of the appellants' attack upon the district court's ruling is in effect to question the lower court's findings of fact, and to characterize the decision as implying that NLRB-style elections are unconstitutional. However, the court's findings of fact are not a proper subject for relitigation on appeal and as noted above, the enormous differences in determining union recognition under the NLRA and the AERA preclude the application of the district court's opinion to NLRB elections. With respect to the appellants' claim that the court interfered with legitimate policy choices of the legislature, the court has no more than re-affirmed the long-established principle that where state regulations become so restrictive and burdensome that they effectively prevent a large number of persons from exercising their First Amendment rights, they run afoul of the Constitution.

[12] Persons under 16 years of age have been permitted to vote in NLRB elections where they meet the criteria of "employees," *Kroder-Reubel Co.*, 72 NLRB 240 (1947), and the evidence established that a substantial number of regularly employed farm workers are under 16 years of age. The appellees also challenge the exclusion from the Act and election procedures of farm workers "engaged in hauling or stitching functions" § 23-1382(1)(g), on the grounds that the exclusion is arbitrary and irrational. The district court found it unnecessary to rule

growers and state have strenuously objected to the district court's reliance upon the plain meaning of the term "preceding calendar year"[13] to conclude that the AERA requires employment in two successive years. The appellants would prefer to read this section as requiring employment sometime during a 365-day period before a petition or an election, i.e., the day before or one year before. Such a reading however, destroys all meaning of the phrase, and rather than interpret the AERA, seeks to strike existing language in order to defend its constitutionality.

While there might be specific circumstances or cases where the NLRB might set similar limitations on employee eligibility, the fact that the AERA legislatively requires these exclusions *in all cases* reveals the truly invidious nature of that Act. The exclusion of workers under 16 from the elections and thus from passing over the threshold to exercise their constitutional rights flies in the face of the historical and legislatively more permissible use of child labor in agriculture and the rights of these workers to exercise their constitutionally guaranteed freedoms. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

Likewise the district court ruled correctly that the requirement that workers be employed for two successive seasons is totally unsuitable for that foremost seasonal and migrant work force—agricultural laborers—which the AERA is specifically designed to regulate. The only explanation for such absolute exclusions—and their actual

on these additional statutory exclusions of otherwise eligible employees. *Cf. Allied Chemical and Alkali Workers v. PPG Co.*, 404 U.S. 157 (1971)

[13] App. at A-27, Jurisdictional Statement; see also definition in Black's Law Dictionary.



impact—is that they were designed to limit the number of farm workers who can participate in unionization. And the three-judge panel so found:

> "These categories of employees eligible to vote set forth in the Act, would appear to be so defined as to preclude a significant and substantial number from participating in the collective bargaining process, from selecting representatives of their own choosing, given the migratory and transitory nature of agricultural employment." (App. at A-28, Jurisdictional Statement).

The imposition of such limits upon the rights to form, join and associate with a union is obviously unconstitutional and clearly justifies summary affirmance of the district court decision.

D. *The court was clearly correct in holding that the lack of alternatives where an election is impossible infringes upon First Amendment rights.*

While the election provision discussed above attempt to drown farm workers' organizational rights in a legal guagmire, the final nail in the coffin is provided by statutory prohibitions on a *Gissel*-type remedy of ordering collective bargaining where an employer has intentionally destroyed the possibility of a fair election despite a clear majority support for a union.[14] § 23-1385(A)(5), *Linden Lumber Division v. NLRB*, 419 U.S. 301 (1974); *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *J.P. Stevens & Co., Inc.*,

[14] A.R.S. § 23-1385(A)(5) states:

> ". . . Nothing in this article shall be construed as requiring an agricultural employer to bargain collectively until a representative of his agricultural employees has been determined by means of a valid secret ballot election."

There could be no more explicit prohibition upon *Gissel*-type bargaining orders unless the Act specifically referred to *Gissel*, and contrary to the contentions of appellants this is not an issue of "interpretation."

*Gilistan Div. v. NLRB*, 441 F.2d 514 (5th Cir. 1971). The result is that the AERA not only compels farm workers to rely exclusively upon election procedures, it then provides the employer with the power to prevent the workers from ever obtaining recognition through that procedure by using intimidation, coercion, firings or even physical force to destroy any possibility of a fair election. This result clearly makes a mockery of the AERA's ostensible policy that agricultural employees "shall be free to organize" as well as their constitutional rights to do so.

E. *The district court's decision is supportable on other grounds and raises no substantial questions for plenary review.*

While the district court's decision is well founded in the guarantees of freedom of speech, assembly and association of the First Amendment, it may be independently supported based upon the overlapping effect of the election procedures on farm workers' right to vote in a state-created election process. *Williams v. Rhodes*, 393 U.S. 323 (1968).

While the State of Arizona was not required to provide for these elections, it chose to do so and furthermore made those elections the exclusive means of exercising certain fundamental rights. As such the state may not draw lines which arbitrarily or irrationally exclude persons who will be directly governed by those elections where such lines are inconsistent with the Equal Protection Clause of the Fourteenth Amendment. The disenfranchisement of seasonal workers through lengthy administrative procedures and the exclusion of workers not employed for two successive years are two examples of such arbitrary restrictions on the right to vote which independently require invalidation of this section. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *City of Phoenix v.*



*Kolodziejski*, 399 U.S. 204 (1970); *Kramer v. Union School District*, 395 U.S. 621 (1969); *Hadnott v. Amos*, 394 U.S. 58 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

It is abundantly clear from examination of the district court's decision invalidating § 23-1389 of AERA that the court's holding is carefully limited to the specific, central and unique aspects of the AERA and narrowly based upon long-established First Amendment principles and decisions. The three-judge panel's decision is likewise soundly based upon specific factual findings resulting from four days of testimony. The appellants' attempt to challenge the evidentiary findings, inject a superficial analogy into the NLRA or assert tangential policy issues does not create a substantial federal question for this Court. The careful and well-founded decision in this aspect of the case raises no issue so novel and unprecedented, nor any issue so conflicting with established law as to justify plenary review by this Court and the decision of the three-judge panel should be summarily affirmed.

2. *The District Court Was Clearly Correct In Finding § 23-1385(B)(8) Invalid And Appellants Raise No Substantial Federal Question.*

There can be no question but that the primary intent of § 23-1385(B)(8) of the AERA was to allow agricultural growers and other affected parties to halt union communications, whether by picketing, handbills, oral conversations or any other means, in a labor dispute by claiming that the publicity was "dishonest, untruthful and deceptive." This Court has consistently invalidated such restrictions and regulations not as a matter of encouraging falsehoods but as a matter of who determines "truth" and by what process. The fact is that the First Amendment has always

protected more than purely "true" speech. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Vanasco v. Schwartz*, 401 F. Supp. 87 (S.D.N.Y. 1975), *aff'd* 423 U.S. 1041 (1976). If it is made a crime to tell falsehoods, as the AERA attempts, then the speaking of truth is restricted as well.

There is no merit to the growers' and the state's attempt to argue now that this provision was intended to operate only to punish past conduct and not to operate as a prior restraint on speech activity. The fact is that this provision was precisely designed to curb union communications *during* the course of a labor dispute—not after the fact—and that is exactly how it has been applied against the plaintiff union.[15] The AERA expressly provides that the Board may issue cease and desist orders against communications it finds in violation of § 1385(B)(8) [see § 23-1390(C)] and the Board or any other aggrieved party may petition the Superior Court for an injunction alleging violation of this same section [§ 23-1390(K) and § 23-1393]. The district court correctly found this section to be similar to those invalidated in *Vanasco v. Schwartz*, 401 F.Supp. 87 (S.D.N.Y. 1975) *aff'd* 423 U.S. 1041 (1976). In *Vanasco* the State of New York argued, just as the State of Arizona and the growers do now, that the state courts should be given the opportunity to engraft the *Times* malice[16] limitations onto a statute which on its face contained no such

[15] On at least two occasions retailers have relied upon the provisions of § 23-1385(B), including (B)(8) to obtain temporary restraining orders without notice against the plaintiff union. (See ¶¶ 7 and 13 of the *Stipulation Regarding Enforcement*).

[16] *New York Times Co. v. Sullivan, supra.*



limitations and made deliberate misrepresentations unlawful. On the same principles recognized in *Vanasco*, the district court here properly invalidated § 1385(B)(8) by finding:

> "The Court in *Vanasco* held that a statute prohibiting 'deliberate misrepresentations' and regulations prohibiting 'misrepresentations' in political campaigns, which on the face of the statute were not based on a finding of actual malice, was an overboard infringement of First Amendment rights and was unconstitutional on its face .
> "The statute here involved likewise contains no intent requirement and in fact is even broader since it is not limited to 'deliberate misrepresentations'.[17]

Finally, there is little to be said for the growers' and the state's suggestions that the court's invalidation of § 1385(B)(8) of the Act amounts to an implied invalidation of § 8(b)(4)(ii)(b) of the NLRA. The constitutional dimensions of the two provisions are entirely different. The proviso of § 8(b)(4) is *not* a prohibitory section of the NLRA at all, but rather a strong affirmation of conduct which is not, and constitutionally cannot be, included within the restrictive clauses. Thus the proviso *guarantees* protections of various means of union publicity.[18] Furthermore, the word "truthfully" in that context applies only to the identification of

[17] App. at A-33, 34, Jurisdictional Statement

[18] The growers and the state totally fail to recognize that the proviso in § 8(b)(4) of the NLRA was in fact inserted as a safeguard of speech rights in labor disputes. *NLRB v. Fruit and Vegetable Packers, (Tree-fruits)* 377 U.S. 58 (1964). No such proviso appears in the boycott provisions of the AERA §§ 23-1385(B)(6)-(10). The NLRA proviso is also careful to distinguish between picketing and other forms of communications, e.g. handbilling, oral conversations, publication, etc., while the AERA makes no such distinctions and broadly restricts all forms of communications.

the employer with whom the dispute exists—not to the *content* of publicity regarding the nature of that dispute.

Section 1385(B)(8) of the AERA takes an exact opposite approach. Rather than guaranteeing protection of publicity, this section broadly restricts speech. The prohibition on the use of "dishonest, untruthful and deceptive" publicity goes far beyond identification of the employer. It both invites and requires inquiry into every aspect of union publicity and the factual validity of even the smallest claims. Such a review and regulation of speech is wholly inappropriate in any area of free speech and particularly in labor relations where "uninhibited, robust and wide open" debate has been encouraged and found to be essential.

3. *The Blatant Unconstitutionality Of The Section Imposing Criminal Penalties Raises No Issues For Further Review.*

The first major issue addressed by the district court concerning the AERA is the imposition of criminal penalties on "any person . . . who violates any provision . . . " of the Act. [§ 23-1392]. The state does not directly attack the court's conclusions regarding the obvious vagueness and overbreadth of this section, and appellees submit that no such attack could be fashioned to justify further review of the lower court's decision.

In essence the imposition of criminal penalties to the entire Act transforms the unfair labor practices under the Act into a broad criminal code for farm workers and persons representing them. The breadth and vagueness of the statute are further extended by the AERA's mandate that the determination of agency shall not be controlled or limited to actual authority or subsequent ratification. § 23-1393(F).

A brief reading of the AERA's unfair labor practices



immediately reveals the unconstitutional overbreadth perceived by the lower court. Thus a farm worker who walked out on strike without a prior secret ballot election or majority approval,[19] or who engaged in recognitional picketing at the wrong time,[20] a union representative who during negotiations raised demands for union participation in the hiring, firing and transferring of workers in collective bargaining negotiations,[21] or a farm worker or supporter of the union who attempted only to persuade a market manager not to sell a struck product,[22] are all persons who could be charged, prosecuted and convicted of a misdemeanor under the AERA. Indeed, to those familiar with labor law, there are countless "crimes" created by this provision.

These examples only begin to demonstrate the twin evils of vagueness leading to "sweeping and improper application" and overbreadth leading to the criminal prosecution for the exercise of protected expressive and associational rights, and the clear necessity for the district court's ruling. *U.S. v. Sullivan*, 332 U.S. 689 (1948); *NAACP v. Button*, 371 U.S. 415 (1963); *Ashton v. Kentucky*, 384 U.S. 195 (1966).

The appellants' insistence that farm workers should pursue constitutional claims through decades of exposing themselves to criminal prosecution further ignores the central evil of a law such as the AERA which represses First Amendment rights as much by threat as by actual operation. As noted by the district court it is this threat which hangs over the heads of all those engaged in agricultural

---

[19] § 23-1385(B)(13)

[20] § 23-1385(B)(12)

[21] § 23-1385(B)(11), § 23-1384(A)(2)

[22] § 23-1385(B)(7)

labor relations which is clearly constitutionally impermissible. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Doe v. Bolton*, 410 U.S. 179 (1973).

The growers and the state recognize this Damoclean effect but assert that it may only be found by choosing the interpretations of the AERA which would be unconstitutional in actual operation. Appellees submit that the district court has done no more than consider the "enormous variety of activities" covered on the face of the Act and found them too sweeping to be tolerated as criminal acts.

The appellants' claim merely blunts rather than removes the Damoclean Sword. In effect they concede that any police officer, prosecutor or judge may choose the same "sweeping and improper" interpretations, thus confirming the district court's ruling. The mere fact that it is "conceivable" that a statute such as the AERA might ultimately be narrowed to fall within constitutional limits does not justify its overbroad and vague infringement upon First Amendment rights as it presently stands. As such the three-judge panel's decision to invalidate this section was constitutionally correct.

4. *The Act's Blanket Denial Of Access To An Employer's Facilities Is Constitutionally Overbroad.*

On numerous occasions this Court has addressed the delicate balance between organizational rights and property rights in the labor context. *NLRB v. Babcock and Wilcox*, 351 U.S. 105 (1956); *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *cf. Marsh v. Alabama*, 326 U.S. 501 (1946). In these cases this Court recognized that accommodations must be made between the employer's Fifth Amendment property rights and the speech interests of assuring communications between employees and union representatives.



> "[W]hen the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize." *Babcock* at 112.

The availability of alternative means of communication has been identified as a major factor in determining the extent to which property rights must yield to speech rights. This factor takes on added significance in the present case since, as the district court found, many migrant agricultural employees are located upon their employer's premises not only during work hours but at most other times as well since they often reside in labor camp facilities owned by him. Thus there is added constitutional significance here. *Marsh, supra; Agricultural Labor Relations Board v. Superior Court*, 16 Cal.3d 392 *app. dismissed*, 429 U.S. 802 (1976); *Illinois Migrant Council v. Campbell Soup Co.*, 478 F.2d 73 (5th Cir. 1973).

Since the existence of adequate alternative means of communication will vary from case to case, that determination must be left for the appropriate Board or court to decide in each instance. However, as the three-judge panel pointed out the Arizona legislature has left no room in § 23-1385(C) of the AERA for such accommodation and balancing between these competing interests.[23] Through this blanket provision which relieves employers of the obligation to allow access by union representatives to their premises and labor camp facilities under *all* circumstances, the AERA imposes overbroad and intolerable restrictions on First Amendment speech activities as they must operate

[23] App. at A-37, Jurisdictional Statement.

in the agricultural labor context. Thus the three-judge panel held correctly that this provision denies First Amendment organizational and speech rights.

5. *Invalidation Of The Section Forcing Unions To Submit To Compulsory Arbitration Without Court Review Was Clearly Correct.*

The final section of the AERA specifically discussed and ruled upon by the three-judge court was § 23-1393(B) which gives a grower the unilateral opportunity to remove disputes from court jurisdiction for the final and binding determination by an arbitrator.

The particular provision addressed is a part of the section that provides court jurisdiction for enforcement of the AERA. This section, subparagraph B, in essence permits an agricultural employer to obtain from a court an automatic temporary restraining order against any strike or boycott activity,[24] and thereby remove the underlying dispute from the court's jurisdiction for referral to a court-appointed arbitrator "to decide the unresolved issues."

---

[24] The provision for a ten-day temporary restraining order solely on a grower's claim that he may lose $5,000 worth of crops imposes a total ban on strike, picketing and related speech activity without regard to whether the strike is for an unlawful purpose or being conducted by unlawful means. Such a blanket prohibition on First Amendment activities is clearly unconstitutional. *Carlson v. California*, 310 U.S. 106 (1940); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Thomas v. Collins*, 323 U.S. 516 (1944). The allowance, with Rule 65 of Arizona Rules of Civil Procedure, for the issuance of such an order *ex parte* is equally unconstitutional under *Carroll v. Commissioners of Princess Anne County*, 393 U.S. 175 (1968). Thus the temporary restraining order provided for in this section is itself an independent reason for invalidating the section.



The three-judge panel examined two aspects of this provision, (1) the employer's ability to compel arbitration without the consent of the union or his employees, and (2) the lack of any judicial review of that arbitration. With respect to the first aspect, the Court held the provision unconstitutional based upon decisions of this Court which were squarely on point. *Dorchy v. Kansas*, 264 U.S. 286 (1924); *Chas. Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923).

The appellants have sought to elevate this portion of the district court's holding to an attempt by that court to resurrect the historical controversy over substantive and procedural due process. In seeking to create such an issue as the basis for further review, the appellants ignore the fact that the decision makes no mention of "substantive due process", that the cases relied upon specifically involve similar statutory attempts to require compulsory arbitration without the consent of the parties, and the fact that these cases have never been overruled by this Court. Appellants further ignore that these cases have been followed on the specific issue of compulsory arbitration by various state and federal courts both before and after *Nebbia v. New York*, 291 U.S. 502 (1934), including the Arizona Supreme Court in 1944, *Henderson v. Ugalde*, 147 P.2d 490 (1944). See also *Mengel Co. v. Nashville Paper Prod. & Spec. Workers Union*, 221 F.2d 644 (6th Cir. 1955) and the annotation cited in the district court's opinion, 55 A.L.R.2d 445.

The second aspect of § 23-1393(B) reviewed by the three-judge court is the removal of the resolution of disputes by arbitration from judicial review. As noted by the court, arbitration of labor relations matters are specifically ex-

cluded from the Arizona laws providing for the enforcement and review of arbitration cases. A.R.S. § 12-1501 *et.seq.* The section of the AERA granting general jurisdiction likewise removes arbitration and requires that the arbitrator "decide the unresolved issues," without any provision for review.

As a result it is the arbitrator under § 23-1393(B), rather than a state or federal court, who is exclusively responsible for resolving factual disputes. Thus where employees strike or threaten to strike over the conduct of a federally licensed farm labor contractor, or over wage disputes which involve potential damages under the Fair Labor Standards Act, or the firing of workers which also raises claims of racial discrimination, the procedures of § 23-1393(B) could be unilaterally invoked to refer the entire matter to binding arbitration without further recourse to state or federal courts. Clearly no state can attempt to remove the resolution of such disputes from all court jurisdiction, including federal courts, without violating federal rights to a trial by jury. *Diederich v. American News Co.*, 128 F.2d 144 (10th Cir. 1942); *Re Smith*, 381 Pa. 223, 122 A.2d 625, *app. dismissed*, 350 U.S. 858 (1955); *Mengel Co., supra.*

The appellants have gone to great rhetorical lengths in their Jurisdictional Statement to expansively characterize this case as one which for the first time applies the Seventh Amendment to all state proceedings. However, the decision of the three-judge panel is not nearly so broad as appellants imagine and does not even mention or discuss the "incorporation" of the Seventh Amendment or its application to all Arizona state proceedings.

Rather, the Seventh Amendment discussion by the district court involved no more than one-half sentence in the entire opinion and applied only to this single sub-paragraph



of the Act, § 23-1393(B). Even then the Seventh Amendment is only one among several reasons given by the panel for invalidating that section. Thus even were this Court to take jurisdiction and reverse on that issue this section of the statute would still be invalid on Due Process grounds and the judgment would remain unaffected.

Thus the district court's invalidation of this subsection is clearly well founded on prior decisions in this narrow area of legislatively mandated compulsory arbitration. Appellants have not presented a proper case for plenary review of the exaggerated Seventh Amendment ramifications they have contrived.

6. *The District Court's Conclusion That The Unconstitutional Provisions Were Inseparable From The Rest Of The Act Is Correct And In Accord With Supreme Court Precedents.*

The district court properly determined that one or more of the sections of the Act found to be unconstitutional were inseparable from the remainder of the Act, rendering the entire AERA unenforceable. In so ruling, the lower court correctly applied guidelines established by this Court relating to severability from a statutory scheme which relied principally on the stricken provisions to effectuate its underlying policies.

The rules applied by this Court in passing on questions of severability are well established. *Dorchy v. Kansas*, 264 U.S. 286 (1923); *Lynch v. United States*, 292 U.S. 572 (1934); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312, 313 (1936); *Meek v. Pittinger*, 421 U.S. 349 (1975).

> "Provisions within the legislative power may stand if separable from the bad. But a provision inherently unobjectionable cannot be deemed separable unless it appears both that, standing alone, legal effect can be

given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy* at 290.

In *Carter, supra,* the Court noted that the absence of a statutory provision for severability creates a presumption against severability. Since the AERA contains no severability clause, the presumption is that the remaining provisions fall with the invalidated ones.[25] Clearly the state and the growers cannot rebut that presumption here.

In the opening passages of the Act, the Legislature declared it to be state policy "that agricultural employees shall be free to organize, to take concerted action, and through representatives of their own choosing enter into collective bargaining contracts," in furtherance whereof, "[i]t is the intent of the legislature to provide a means to bargain collectively which is fair and equitable to agricultural employers, labor organizations and employees; to provide orderly election procedures to resolve questions concerning representation of agricultural employees and to declare that certain acts are unfair labor practices which are prohibited and subject to control by the police power of this state." 23 A.R.S. § 1381. From this it is clear that the election procedures established in § 1389 of the Act are crucial to the operability of the entire AERA. Moreover, the rights of agricultural employees to self-organization

[25] Even the inclusion of such a clause, while reversing the presumption, would not conclusively save a statute. Where the standards announced in *Dorchy, supra,* have not been met, the Court has disregarded such severability clauses, noting that they serve "as [aids] merely; not as . . . inexorable command[s]." *Dorchy, supra,* 264 U.S. at 290. Indeed, the statutes reviewed in *Dorchy, Carter* and *Meek, supra,* all contained severability clauses.



and to bargain collectively, enunciated in § 1383 of the Act, may, according to the terms of the Act, be exercised effectively *only* through the election mechanisms prescribed in § 1389. As the district court correctly noted:

> "If this section [1389] fails, the rest of the Act must fail, since most of the use of the Act would apply only if farm workers were initially free to organize and not if the exercise of such a constitutional freedom of assembly were made impossible." (App. at A-25, Jurisdictional Statement).

The election procedures, boycott provisions and no-strike mandates struck down by the district court stand at the heart of the AERA. As indicated in the Act's Declaration of Purpose (§ 23-1381), and argued by the appellants themselves before the district court, the AERA was enacted purportedly to balance the rights of agricultural employers and employees, i.e., to assure that crop production would not be obstructed and at the same time to enable workers to organize. The deletion of the anti-strike and anti-boycott provisions, which gave protection to the employers or the recognition election provisions, which purported to confer minimal rights on employees would serve to favor one side or the other and upset the balance envisioned by the legislature should the remainder of the Act continue in effect.

Quoting this Court's observation in *Carter, supra,* the provisions of the AERA "are not like a collection of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." 298 U.S. at 315, 316. If the legislative balance devised in the AERA is constitutionally flawed, as the district court has

held, the Act must be nullified in all its provisions and returned to the legislature to strike a new balance.[25a]

7. *The Three-Judge Court Ruled Properly That The Record Of Enforcement Of The AERA Against The Appellees Established An Article III Controversy.*

A. *The record of enforcement of the AERA, both actual and threatened, reveals a real and justiciable controversy.*

The defendant state and intervening growers on several occasions raised before the district court their contention that the plaintiffs' challenge to the AERA was "hypothetical". The three-judge panel carefully considered this issue, asked that a record be made regarding it, and then after lengthy briefing properly decided that there was in fact the requisite Article III controversy. A review of the record quickly demonstrates the reality and extent of that controversy.

Contrary to the suggestions of the growers and state in their Jurisdictional Statement, at the time the Amended Complaint was filed, the Agricultural Employment Relations Board (Board) created by the Act had been appointed and was fully funded and staffed. Also, as alleged in the Amended Complaint, that Board had already initiated unfair labor practice charges against the plaintiff union to

[25a] The cases cited by the appellants in urging severance of the invalidated clauses are entirely disimilar. In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the invalidation of portions of one statute enacted in 1972 were clearly separable from a related but different statute passed in 1966 and revised in 1971. Similarly in *United States v. Jackson*, 390 U.S. 570 (1968), the validity of the Federal Kidnaping Act was sustained despite the unconstitutionality of a penalty provision where the invalidated clause had been added three years after the statute's original enactment. In *Champlin Refining Co. v. Corporations Commission*, 286 U.S. 210 (1932), the Court relied heavily on the inclusion of a severability clause in the statute.



enjoin its boycott activities under § 23-1385(B) of the AERA, including § 1385(B)(8) which has now been expressly ruled unconstitutional by the district court.[26]

By the time of trial the *Stipulation Regarding Enforcement*, entered into as part of the pretrial order, revealed that no less than seven superior court actions had been initiated against the plaintiff and various of its members and supporters alleging violations of the AERA.[27] The appellant Board was plaintiff in one of these.[28] The result of several of these suits was the enjoining of protected speech activities, including handbilling and oral conversations by union members and supporters in furtherance of their consumer boycotts.[29] In three of these actions, First Amendment speech activity was enjoined by temporary restraining orders without notice or hearing under provisions of the AERA in direct conflict with the guidelines set down by this Court in *Carroll v. President and Commissioners of Princess Anne County*, 393 U.S. 175 (1968).[30]

In addition to these civil suits the Board itself had also filed complaints and conducted administrative hearings against the appellee union and its members which violated

[26] *Stipulation Regarding Enforcement* ¶2F

[27] *Id.* ¶ 1, 2, 3, 7, 12, 13 and 20

[28] *Id.* ¶12

[29] The growers and the state are in error when they claim that no sections of the AERA discussed by the court have been used against the appellees. In at least 4 of the actions enforcing the Act against appellees the parties bringing the actions relied upon this provision (see *Stipulation* ¶ 2, 3, 7 and 13). The growers and the state are also incorrect in their contention that the election procedures have never involved any delay. The only contested election even scheduled was set for 1 week after the harvest and after the majority of workers had left. See discussion above, § 1A.

[30] *Stipulation Regarding Enforcement* ¶ 7, 12 and 13.

their First Amendment rights. In one charge the Board had placed a total ban on much of the union's boycott activity at several stores regardless of how peaceful the conduct or by what means messages were communicated.[31] At no time in over five years did the Board or its General Counsel indicate that they would enforce the AERA against the appellees to any degress less than a full application of its sweeping terms. And that is precisely how it has been enforced.

In addition to the growers and the state being in error in suggesting that those specific provisions addressed by the court have not been used against the appellees (n.29, *supra*), appellees submit that the appellants are misled in their attempt to restrict their Article III discussion to only those provisions. The Amended Complaint challenged the validity of the *entire* AERA and the district court ultimately found invalid the *entire* Act. Therefore it is the enforcement of the whole Act and not just those provisions discussed in the district court's opinion which must be considered when discussing the Article III implications.

Another very significant factor that must be considered for Article III consideration is that the AERA existed as a *criminal statute* as well as an administrative one. § 23-1392 of the Act made violation "of any provision of this article . . . a misdemeanor punishable by a fine of not more than five thousand dollars, by imprisonment for not more than a year, or both."

This Court on numerous occasions has held in facial attacks upon overbroad criminal statutes that the parties affected need not await actual prosecution before an Article III case or controversy exists. *Doe v. Bolton, supra; Steffel v. Thompson*, 415 U.S. 452 (1974); *Carey v. Population*

[31] *Id.* ¶ 11.



*Services, Int'l.*, 431 U.S. 678 (1977). In light of the record enforcement of the AERA there can be no question but that the plaintiff union and its members were the parties "against whom [this] statute directly operate[d]" and that they "asserted a sufficiently direct threat of personal detriment".[32] It is also clear that the actual enforcement of the AERA against plaintiffs was much greater than that experienced by the plaintiffs in *Steffel, Bolton*, and the numerous other cases cited by the district court.[33] Nor in over five years did the state through its attorney general or any other agent ever indicate it did not intend to enforce the Act criminally.

The record also established beyond question that the plaintiffs suffered concrete and definite harm from application of the AERA. The unrebutted testimony was that because of the AERA plaintiff farm workers in Arizona had been deprived of improvements in wages and working conditions that workers in other states had acquired (Tr. 206). In addition the plaintiff union lost many members as well as several collective bargaining agreements it had prior to the Act. Testimony indicated that this resulted because employers, once shielded by the AERA, were less willing to negotiate with the appellee union. Finally the record showed that some UFW supporters had been unwilling to continue their participation in boycott activities because they were threatened with arrest or contempt citations under the Act (Tr. 202-208).

Surely the sum of these circumstances meet the frequently-cited standard laid down in *Maryland Casuality Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941):

[32] *Doe v. Bolton*, 410 U.S. at 188.

[33] See App. at A-11, Jurisdictional Statement.

> "Basically the question in each case is whether the facts alleged under all the circumstances show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id.* at 512.

B. *Plaintiffs have further demonstrated a case or controversy under the standard applied when statutes are challenged for facial overbreadth.*

The facts in Section 7A above amply show that a case or controversy exists in this case under the traditional test. However, a second standard is also applicable. The appellees' challenge to the AERA was primarily a challenge to the Act as constitutionally overbroad on its face. They alleged that some eleven provisions of the Act encompassed within their prohibitions conduct absolutely protected by the First Amendment, and the district court agreed with respect to those provisions it found necessary to discuss. In First Amendment cases of this nature this Court has frequently departed from the traditional jurisdictional rules and has applied a more liberal standard for finding a case or controversy because of the "danger of tolerating in the area of First Amendment freedoms the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. at 433.

In this way claims of facial overbreadth have been upheld against statutes regulating speech. *Gooding v. Wilson*, 405 U.S. 518 (1972); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Epperson v. Arkansas*, 393 U.S. 97 (1968); where rights of association were threatened, *Keyishian v. Board of Regents*, 355 U.S. 589 (1967), *Shelton v. Tucker*, 364 U.S. 479 (1960), and where laws purported to regulate the time, place and manner of expressive conduct, *Zwickler v. Koota*, 389 U.S. 241 (1967); *Thornhill v. Alabama*, *supra*.



In many of the overbreadth cases there had been no enforcement of the statute at all against the plaintiffs. However, rather than await a case-by-case excision of a statute's overbreadth or vagueness through review of its application to particular conduct, under the rubric of the overbreadth doctrine such laws have been invalidated facially so as to end their deterrence of constitutionally protected activity.

The growers and the state miss the mark when they suggest that the decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) supports their claim that no controversy exists. First of all this Court in *Broadrick* by no means restricted the overbreadth doctrine so narrowly as appellants now argue. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975).

Secondly, even the *Broadrick* test is met in the present circumstances. The overbreadth in the AERA is most certainly both *real* and *substantial*. The protected activities which plaintiffs allege are encompassed within the proscriptions of the Act—e.g., the right to picket and strike, the right to speak freely in collective bargaining, the right of access to workers—are the very activities which the plaintiffs absolutely must be permitted to undertake in order to accomplish the objectives for which their association was formed. They are also the very activities which the AERA has been applied to enjoin. Thus plaintiffs do not point speculatively to fringe conduct which someday may be wrongfully enjoined, but rather to that conduct essential to the meaningful organization of farm workers and already frustrated by the AERA.[34]

---

[34] The appellants also are in error when they attempt to distinguish this case from other overbreadth cases arguing that it is a comprehensive regulatory statute and citing *Alabama State Federation of Labor v.*

Finally, it is significant that the appellee United Farm Workers brings this action on behalf of itself *and its members*, i.e., agricultural workers who are included within the Act's coverage. As such the plaintiff union has standing to assert not only its own interests but those of its membership as well. *NAACP v. Alabama*, 357 U.S. 449 (1958); *United Mine Workers v. Illinois Bar Assoc.*, 389 U.S. 217 (1967).

Furthermore in such circumstances the union is in a posture to assert the rights of other farm workers who are the very persons the UFW wishes to organize but who are restricted in such efforts by the AERA. In this vein the appellee UFW certainly has demonstrated at least that degree of interest necessary to establish a case or controversy recognized by this Court in *Craig v. Boren*, 431 U.S. 678 (1977) and *Carey v. Population Services Int'l.*, 431 U.S. 678 (1977).

Thus whether one applies (1) the traditional case or controversy test, (2) the standard applicable when a statute is challenged for First Amendment overbreadth, or (3) the doctrine permitting an organizational plaintiff to represent the rights of its aggrieved members or other third parties,

*McAdory*, 325 U.S. 450 (1944) and *A.F.L. v. Watson*, 327 U.S. 582 (1946). However the growers and state can take no solace in the fact that the AERA contains not just one but several provisions restricting First Amendment freedoms and the authority they cite certainly does not support such a position. In fact, as this Court noted, the Complaint in *McAdory* did *not* allege any direct restrictions on First Amendment activities, 325 U.S. at 457 but merely alleged possible indirect effects as a licensing statue. Thus, this Court did not even undertake in *McAdory* a discussion of the overbreadth considerations. In *Watson* the U.S. Constitutional issues hinged on whether an amendment to the Florida constitution was self-executing or not. There is no similar question here.



the appellees in each case satisfy the controversy requirements of Article III.

8. *The Three-Judge Panel Ruled Correctly That The Doctrine Of Abstention Is Inappropriate In The Instant Case.*

The appellants argue further that the district court should have abstained in this matter. To support this contention they point to five provisions where they feel the lower court should have stepped aside to permit a "narrowing" state court interpretation. This argument of course concedes an Article III case or controversy since the doctrine of abstention involves not a matter of jurisdiction but rather an exercise of the court's discretion. *Baggett v. Bullitt*, 377 U.S. 360, 375. The district court exercised that discretion properly when it decided not to abstain in this case.

At least since *McNeese v. Board of Education*, 373 U.S. 668 (1963), it has been established that in a 42 U.S.C. § 1983 action the plaintiffs need not exhaust their state judicial remedies before availing themselves of their federal forum. In fact subsequent to *McNeese*, it has been overwhelmingly established that civil rights cases are the least appropriate instances for the federal courts to abstain to await state court adjudications. *Zwickler v. Koota*, 389 U.S. 241, 241-252 (1967).

> "After examining the purposes of the Civil Rights Act . . . [w]e would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court . . . . These principles have particular significance when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such case to force the plaintiff who has commenced a federal action to suffer the delay of state court pro-

ceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 251-252.

Since the doctrine of abstention has the effect of frustrating a federal litigant in his choice of an otherwise appropriately invoked federal forum, it has been applied only in narrowly limited special circumstances, *Zwickler, supra; Baggett v. Bullitt, supra.* In those narrow instances where federal courts have abstained—almost always in areas other than civil rights litigation—they have done so only in those special and extraordinary circumstances where the issue of state law was uncertain *and* where there was a *substantial* and *immediate* possibility that a single or otherwise prompt state court interpretation of the state law question would obviate the necessitate of deciding the federal constitutional issue. See *Steffel v. Thompson, supra; Harman v. Forssenius,* 380 U.S. 528, 534 (1965); *Wisconsin v. Constantineau,* 400 U.S. 433 (1971).

The present case does not pose such a situation where the state statute is "obviously susceptible of a limiting construction,"[35] and where there is a substantial possibility of a relatively swift state court interpretation that could eliminate the federal question.

The provisions of the AERA challenged in the Amended Complaint are express and clear. Their defects under the First and Fourteenth Amendments are blatant. For example the growers and the state do not dispute the appellees' claim that the Act limits the right to strike only to a majority of employees [§ 23-1385(B)(13)] and calls for an automatic ten day temporary restraining order during harvest

[35] *Zwickler, supra,* 389 U.S. 241, n. 14.



time strikes [§ 23-1393(B)]. The meaning of these sections is certain; the only question is whether they run afoul of the Constitution.[36]

In similar fashion the parties have had no true differences in determining the clear meaning of the AERA's boycott provisions. The Board has stipulated that both it and its general counsel both read and have applied § 23-1385(B)(6) and (7) as prohibiting certain handbilling and oral conversations which the plaintiffs contend are pure speech and constitutionally protected.[37] Again the only difference to be resolved between these parties on this issue is one of constitutional law.

The growers and the state are plainly in error in suggesting that the examples they propose in their Jurisdictional Statement would justify abstention. First of all, they are points not critical to the district court's decision. In most examples raised by the appellants the district court invalidated the statute on issues *other* than those referred to in their abstention discussion; they do *not* propose possible interpretations to critical terms upon which the validity of a provision may stand or fall. Secondly, the sections they refer to are quite clear and do not lend themselves to the alternative interpretations the appellants suggest.

For example, regarding the clarity of the provisions, it has been only the appellants who have had any questions about the unavailability of bargaining orders under the AERA. There can be no doubt—and the district court had

[36] *A.F.L. v. Swing,* 312 U.S. 321 (1941), *Carroll v. President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968); *Baldwin v. Arizona Flame Restaurant,* 82 Ariz. 385, 313 P.2d 759 (1959).

[37] See *Stipulation Regarding Enforcement* ¶¶ 11 and 12.

no difficulty determining—that the Act expressly prevents the Board from ordering an employer to bargain with a union unless that union has won a representation election.[38]

Appellants next argue that the Act's use of the term *calendar year* may mean something other than the meaning universally given the term, i.e., January 1 through December 31. Without referring to any Arizona authority they suggest it might mean merely the preceding 365 days measured from some indeterminate date. However, such an interpretation would require striking words "preceding" and "calendar" and give the phrase absolutely no significance whatsoever in the context in which it was used.[39]

Likewise, the application of Arizona's Administrative Procedures Act hardly calls for abstention. First of all, their proposed alternative "interpretation" is highly attenuated at best. Secondly, there was ample evidence in the record that the same delay in the election process would exist even should the APA standard not be applicable.[40]

Next the appellants suggest that the lower court should have abstained to determine if the Arizona courts would someday incorporate the *Times* malice limitation upon a provision of the statute which on its face obviously had no such limitation. The law is clear however that in the area of First Amendment overbreadth federal courts need not—indeed should not—defer to the mere possibility of such state court action. *Zwickler, supra; Vanasco v. Schwartz, supra.*[41]

---

[38] See Note 14, above.

[39] See discussion in Section 1C, Elections, above.

[40] The 20 day period required by the APA for notice of a pre-election hearing is a relatively minor point in light of testimony by experts from both sides that under NLRB experience, 14-21 days were required to administrate nearly identical procedures.

[41] See discussion in § 2, *supra.*



Finally the appellants' discussion of the impact of the term "facilities" in § 1385(C) ignores the record in this case. As the district court pointed out, in the context of agricultural labor adequate communication with migrant employees means not only access to field where they may work but also to labor camp residences, frequently the only place these workers may be contacted outside working hours. These camps are almost always owned by the agricultural employer and located somewhere upon his ranch. The terms of § 1385(C) clearly allow the employer to deny union representatives access to such facilities under all circumstances. Therefore the district court was correct in finding the provision overbroad on its face.[42]

The appellants have failed to demonstrate that this is a situation where the statute is so uncertain that the federal court should await a state court interpretation. The provisions are *not* fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question. *Harman v. Forssenius, supra.* Furthermore this Court in those cases where it has rejected abstention has noted that the doctrine operates to require piecemeal adjudication thereby delaying ultimate adjudication on the merits for an undue time. It has further indicated that the consequences of this are costly when the overbreadth of the statute inhibits the exercise of constitutionally protected conduct. *Baggitt, supra,* at 379; *Keyishian v. Board of Regent,* 385 U.S. 589.

There is no substantial possibility that a single proceeding will arise in state court in which the state courts could act swiftly to redress the AERA's numerous intrusions upon constitutionally protected conduct. The appellees should not be forced to forego their First Amendment

---

[42] See discussion in § 4, *supra.*

rights and to face decades of litigation to reconfirm the unconstitutionality of the AERA that is presently clear on its face and already so determined in the district court's opinion.

## CONCLUSION

The three-judge panel acted properly in finding that the major provisions of the AERA totally vitiated fundamental freedoms of agricultural employees and labor organizations representing them. In its detailed Findings of Fact and Conclusions the court amply demonstrated that those provisions in fact operated to exclude most farm workers from participating in that election process established as the sole avenue to union recognition. In addition the Act directly deprived these same parties of the use of most of the means of communication that have been recognized as essential to organizing and association through labor organizations.

The widespread application of the AERA, the fact that its overbroad provisions were enforceable through criminal penalties, and the adverse effects of the Act upon the appellees appearing in the record convinced the court that the case or controversy requirement of Article III had been satisfied.

Contrary to the growers' and state's suggestion, the district court has not prohibited proper experimentation by a state legislature. Rather, appellees submit that the court's opinion will foster rather than inhibit such experimentation by providing some of the first concrete judicial guidelines for dealing with these competing interests. The court has only reaffirmed the long-established principle that there are constitutionally imposed limits upon the avenues available to law-makers when drafting regulatory statutes. The



three-judge panel has reminded us that those limits are breached when the regulations suppress the exercise of fundamental freedoms of expression and association. Subject to this basic limitation, however, the Arizona and other state legislatures still remain free to experiment with a wide variety of union recognition and election procedures in the unique field of agriculture.

Therefore appellees respectfully submit that the questions raised in the Jurisdictional Statement are insubstantial. The decision below is so plainly correct as not to warrant further review and should be summarily affirmed by this Court.

Respectfully submitted,

JEROME COHEN
JAMES RUTKOWSKI

P.O. Box 1049
Salinas, California 93902

MICHAEL W. L. MCCRORY

631 Wood Street
Vineland, New Jersey 08360

Attorneys for Plaintiff-Appellees

Counsel for the Plaintiff-Appellees wish to acknowledge the assistance of Jeffrey P. Sweetland and Lydia K. Anderson in the preparation of this motion.